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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

CESAR HUGO NEVAREZ

Defendant and Appellant.

G041965

(Super. Ct. No. 08WF1322)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John Nho Trong Nguyen, Judge. Dismissed.

David K. Rankin, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

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Cesar Hugo Nevarez (defendant) filed an appeal to challenge an erroneous abstract of judgment. The abstract of judgment has been amended already and we dismiss the appeal as moot.

## I

### FACTS

Defendant plead guilty to violations of Health and Safety Code sections 11378 (possession for sale of a controlled substance), 11379, subdivision (a) (sale or transportation of a controlled substance), and section 11366.8, subdivision (a) (having a false compartment for purposes of transporting a controlled substance). He was sentenced to the middle term of three years in state prison on the sale or transportation count and the upper term of three years in state prison on the false compartment count, the sentences to be served concurrently. The sentence on the possession count was stayed pursuant to Penal Code section 654. The priors were dismissed. The total prison term was three years.

The abstract of judgment filed February 26, 2009 erroneously stated that the total time to be served was five years. The error pertained to enhancements for prior convictions.

Defendant filed a notice of appeal in April 2009. In the attached request for certificate of probable cause, he said that he was sentenced to three years in prison, but when he got there, the officials told him he had been sentenced to five years. Defendant said, “I would like the court to correct my time please . . . .” (Capitalization omitted.)

On May 14, 2009, an amended abstract of judgment was filed, showing the total prison term to be three years. On May 15, 2009, an order denying certificate of probable cause was filed, citing Penal Code section 1237.5. A minute order of the same date reflected the amendment of the abstract of judgment to correctly reflect the total prison term of three years and the filing of the order denying the certificate of probable cause.

Not having been informed of the status of the matter in the superior court, we appointed counsel to represent defendant on appeal. In October 2009, defendant's counsel filed an opening brief. He recited the above referenced facts, including the amendment of the abstract of judgment and the denial of the request for a certificate of probable cause. In addition, counsel, while not arguing against defendant, requested that this court conduct an independent review of the record on defendant's behalf, pursuant to *People v. Wende* (1979) 25 Cal.3d 436.

## II

### DISCUSSION

Defendant's counsel claims the appeal is authorized by Penal Code section 1237 and California Rules of Court, rule 8.304(b)(4)(B). For reasons we shall show, we agree that those sections authorize a challenge to the erroneous abstract of judgment, but they do not authorize a challenge based on any issue affecting the validity of the plea or the legality of the proceedings.

Penal Code section 1237, subdivision (a) provides that a defendant may take an appeal "[f]rom a final judgment of conviction except as provided in Section 1237.1 and Section 1237.5. . . ." Section 1237.5, applicable here, states: "No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, . . . except where both of the following are met: [¶] (a) The defendant has filed with the trial court a written statement . . . showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings. [¶] (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court."

California Rules of Court, rule 8.304(b) provides: "(1) Except as provided in (4), to appeal from a superior court judgment after a plea of guilty or nolo contendere . . . , the defendant must file in that superior court[,] with the notice of appeal . . . [,] the statement required by Penal Code section 1237.5 for issuance of a certificate of probable

cause. ¶ (2) Within 20 days after the defendant files a statement under (1), the superior court must sign and file either a certificate of probable cause or an order denying the certificate. ¶ (3) If the defendant does not file the statement required by (1) or if the superior court denies a certificate of probable cause, the superior court clerk must mark the notice of appeal ‘Inoperative,’ notify the defendant, and send a copy of the marked notice of appeal to the district appellate project. ¶ (4) The defendant need not comply with (1) if the notice of appeal states that the appeal is based on: ¶ . . . ¶ (B) Grounds that arose after entry of the plea and do not affect the plea’s validity. ¶ (5) If the defendant’s notice of appeal contains a statement under (4), the reviewing court will not consider any issue affecting the validity of the plea unless the defendant also complies with (1).”

In this case, defendant’s notice of appeal, in compliance with California Rules of Court, rule 8.304(b)(4), indicated that it was based on grounds that arose after entry of the plea and did not affect the validity of the plea. The ground was that the February 26, 2009 abstract of judgment erroneously reflected his prison sentence to be five years instead of three years. He did not attack the validity of the plea and only requested that the abstract be corrected. That has been done.

Under California Rules of Court, rule 8.304(b)(5), we do not consider any issue affecting the validity of the plea, unless defendant also complied with rule 8.304(b)(1). In this case, defendant requested a certificate of probable cause, but he did not, as required by Penal Code section 1237.5, subdivision (a), file “with the trial court a written statement, . . . showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the [underlying] proceedings,” having only requested a correction of the abstract of judgment. Since he did not comply with subdivision (a), and since the superior court denied the certificate of probable cause, we do not consider any issue affecting the validity of the plea. (Cal. Rules of Court, rule 8.304(b)(5).) As stated in the recent case of *People v. Brown* (Jan. 26, 2010, No. B211558) \_\_ Cal.App.4th \_\_ [2010

D.A.R. 1361, 1362], “where an appeal goes forward without a certificate of probable cause based upon noncertificate grounds, a defendant may not raise additional claims that do require a certificate. [Citation.]”

### III

#### DISPOSITION

The matter of the erroneous abstract of judgment having been resolved, the appeal is dismissed as moot.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.